Cm

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-1749

FREDDY DUANE BLAKLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
Attorney General of Florida

BENEDICT P. KUEHNE
Assistant Attorney General of Florida

KENNETH G. SPILLIAS
Assistant Attorney General of Florida

111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401

Counsel for Respondent

INDEX

CITATIONS

CITATIONS - Continued

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-1749

FREDDY DUANE BLAKLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PRELIMINARY STATEMENT

Petitioner, Freddy Duane Blakley, was the Petitioner and Appellant in the respective lower courts, the Florida Supreme Court and the Florida Fourth District Court of Appeal. Respondent,

the State of Florida, was the Respondent and Appellee in those courts. The parties are referred in this brief as they appear before this Court.

OPINIONS BELOW

The Order of the Supreme Court of Florida denying Petitioner's Petition for Writ of Certiorari in Case No. 55,252 is cited at 368 So. 2d 1362. The decision of the Fourth District Court of Appeal affirming Petitioner's conviction is reported at 362 So. 2d 309.

JURISDICTION

Respondent agrees with Petitioner's contention that this Court is authorized under 28 U.S.C. 1257(3) to review by certiorari decisions of state courts.

QUESTION PRESENTED

Whether the Prosecution in a criminal trial in the State of Florida is permitted to elicit testimony regarding an accused's silence in the face of custodial interrogation where such testimony is for the sole purpose of establishing the sanity of the accused in the face of a claim of insanity? (Restated)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself...

The Fourteenth Amendment to the United States Constitution provides, in applicable part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Respondent accepts much of the objective recitation of the factual matters contained in Petitioner's Statement of the Case. Respondent notes the following additions:

Mary Eberhart, 19, the victim of the sexual battery perpetrated by Petitioner, left the Swinging Door Lounge sometime before 8:00 p.m. on February 6, 1976. A man asked her if she wanted any help, and Eberhart responded in the negative. The man then bumped her into the vehicle, choked her, ripped her blouse open, and proceeded to penetrate the victim against her will.

Sergeant Richard Biggs met Petitioner Blakley at the Swinging Door Lounge shortly after the sexual battery occurred. The victim was hysterical. At the police

station, Petitioner was advised of his Miranda rights and indicated that he understood them.

Prior to the trial of this case, the accused filed a pre-trial notice of intent to rely upon the defense of insanity. In an effort to counter Petitioner's assertion of insanity, the Prosecution elicited the following from Officer Richard Biggs:

> Q. You had a conversation with him at that point; is that correct?
> A. Yes, sir.
> Q. What did you say to him?
> A. I advised the defendant who I was. I wasn't in uniform. I was in plain clothes, a detective, and advised him of his Miranda warnings.
> Q. How did you do that?
> A. By reading off of a card which is located in wallet.
> Q. Did you read each and every one of those warnings to him?
> A. Off of the card,I did.
> Q. What procedure did you follow?
> A. I took the card out of the wallet. I sat him in a chair. I sat behind my chair, and began to read the Miranda warnings off this card.

Q. He was seated?
A. He was sitting.
Q. As to each of the rights, did you read all of them?
A. Yes.
Q. How did you do that?
A. After I read each right I questioned him if he understood that particular right as I read it to him; and he indicated, yes, he did.
Q. How long were you with him on that particular occasion, in your office, if you recall?
A. A couple of hours. I would say an hour and a half to two hours.
Q. You were with him an hour and a half on that occasion?
A. Yes.
Q. What did you do during that period?
A. Well, a case of this magnitude, there is always an awful lot of booking procedures.
Q. Paperwork, and so on?
A. Yes, sir.
Q. Those reports, did you start to prepare those?
A. Yes, sir.
Q. Did you complete those that evening? Did you again speak with Mr. Blakley?
A. Yes, shortly after advising him of his Miranda rights from the Miranda rights warning card which I have in my wallet.

I produced a waiver of those rights, and again I read him his rights and asked each time after

reading the particular right if he understood.
Q. Do you have the original?
A. Right here.
Q. I would like to show you what has been marked as State's Exhibit "H" for identification and ask if you can identify and tell us what that is?
A. Yes, sir, I can identify it. It is the waiver of rights which was signed by the defendant and myself on the evening of February 7, 1976, at approximately 2:05 in the morning.
Q. How did you know that that is the original waiver form, rights waiver form?
A. Because my original signature is on it.
Q. What procedure did you use to have this filled out or the rights read to him from this?

Who filled in the top part with the name and the place and time?
A. Sergeant Kreulen.
Q. Does this sheet contain each and every one of the Miranda rights?
A. Yes, sir.
Q. How did the defendant indicate that he understood each of these rights?
A. As each right was read to him by myself, I asked the defendant if he understood that particular right.

He stated, yes. I asked if he would sign, yes, that which he did.

Q. Do all those rights require a yes answer if they understand?
A. If they understand, they will answer yes. If they don't understand the rights, they will answer no to it.
Q. Are there any rights on that form that a person, by acknowledging that he understands that right, would indicate something other than a yes?
A. Yes, there is.
Q. Read that and tell us what is is.
MR. LASWELL[defense counsel]: Objection. I think the exhibit speaks for itself.
THE COURT: Objection sustained.
MR. SPRINGER: I assume since it's not in evidence.
MR. LASWELL: It would be fundamental error to what is going on here. I would like to have a continuing objection noted on this entire line of questioning, and everything else.
THE COURT: Let the record note the objection of the introduction of this as an exhibit.
Q. Other than referring to the exhibit, in reading those rights to him, would you read a right and hand it to him? Did you show it to him?
A. Before I handed it to him, I first asked if he understood what I had just read to him. If he answered yes or answered no, I instructed: "Please put that on the sheet and initial it to either yes or no."

Q. Did you ask him to read the rights in addition to having read it to him?
A. Yes, after I read it from the waiver form, I handed it to him to read and answer and to initial it.
Q. Were his responses or indications all yes to each right?
A. No, sir, he responded no to one of his rights.
Q. Which right was that?
A. The right if he would be willing to talk to us, the police officers, in reference to this case. In reference to what he was there for.
Q. Did he sign it in your presence?
A. Yes, he did.
Q. How many times have you, in your career as a police officer, read individuals their rights?
A. Hundreds of times, sir.
Q. How many times have you read and advised individuals of their rights from a rights waiver form as opposed to a Miranda warning card?
A. Also hundreds of times.
Q. Have there been any occasions upon reading these rights from either the rights card or the rights waiver form that persons just did not respond to your questions, as to understanding?
A. Yes, sir.
Q. They did not indicate with a signature and initial?
A. Yes.

On cross-examination, defense counsel asked these questions about Miranda warnings:

Q. Is it also your practice of processing to keep defendants in custody as long as possible, giving him his Miranda warnings in that office?
A. No, sir. He was given his Miranda warnings at the crime scene by another police officer.
Q. Then he was given them again five hours later?
A. When he met with me, to talk with me, yes, sir.
Q. That is the customary proceeding of a police station?
A. I think you will find it the customary proceeding in most police divisions.
Q. Do you have a copy of the first Miranda warning you gave to him, that you gave to the defendant?
A. Yes, sir.
Q. Do you have it with you?
A. Yes.
Q. Is this the one in your wallet?
A. Sure.
Q. So, this is what you gave to him orally.
What exactly did you say to the defendant when you read these rights off of the card?
A. Just prior to reading the rights to him, at the time I was a detective, in plain clothes. I advised the defendant that I was a police officer; I was employed

by the City of Wilton Manors; and that he was under arrest for this act; that before I spoke to him about this, I wanted to advise him of his rights under Miranda.
At which time, I produced the card. I produced it and read those rights to him.
Q. Did you explain his rights to him?
A. No, sir, I didn't explain.
Q. Did you read them?
A. Yes, I read them.
Q. Where was the defendant at the time you read these rights to him?
A. Sitting at the chair or side of my desk.
Q. This was the first time?
A. Yes, sir.
Q. Approximately what time was this?
A. I would have to refer to the Miranda -- because it was a few minutes before the waiver was done.
Q. Wait a minute. You said that his rights were given to him twice.
A. Twice by me.
Q. Was it given to him by anyone else?
A. Yes.
Q. How did you know that?
A. At the crime scene.
Q. Were you there? Who came there?
A. Officer Stephen Kenneth.

Q. Did he also read it to him from a Miranda card?
A. Yes, sir.
Q. Were they explained to him?
A. By Officer Kenneth, no, sir.
Q. All he did was read them?
A. Yes, sir.
Q. During the time you have been with the Wilton Manors Police Department, have you ever had occasion to see a defendant who signed anything that he thought what he signed would assist in his release?
A. I don't understand what you are asking. Would you repeat it?
Q. During your experience in the Wilton Manors Police force, have you ever experienced a defendant that would just sign a Miranda warning in the hope that they would be released after signing it?
A. No, sir.
Q. Never?
A. No.
Q. So, have you ever happened to be there when they just wouldn't go along with the program?
A. I have had people who have refused to sign them.
Q. Have you ever had anyone who signed a rights waiver that you felt in your own mind may not have understood what he was signing?
A. No, sir, because if I had any one of those, I can't recall them.

Q. What would that indicate to you, that someone might not understand what he was signing?
A. If he didn't understand the English language.
Q. That is right. Obviously, that is the criteria, obviously not in every case, to understand the English language?
A. No, sir, that is not the criteria.
Q. What do you do if they don't understand?
A. If they don't understand the reading, I explain it to them.
Q. What about Mr. Blakley's case? He understood English; is that right?
A. Yes, sir.
Q. Therefore, you assumed he understood the Miranda warnings that you were giving him?
A. Yes, sir.
MR. TAYLOR: No further questions.

No motion for mistrial was made by the defense counsel until the conclusion of the testimony of Richard Biggs.

During closing arguments to the jury, defense counsel requested that a verdict of not guilty by reason of insanity

be returned (Resp. App. A)[1]. The jury was instructed on insanity during the court's charge.

ARGUMENT

Petitioner argues that the Fifth Amendment privilege against self-incrimination, as applied to the States through the Fourteenth Amendment, prevents the prosecuting authority in a criminal trial to comment on an accused's silence at the time of arrest, even when such comment is for the sole purpose of demonstrating sanity in response to a claim of insanity. Petitioner specifically argues that the decisions of the Florida courts in this case conflict with the rules of law pronounced in Doyle v. Ohio, 426 U.S. 610 (1976); United States

[1] "Resp. App. A" refers to Appendix A of Respondent's Brief in Opposition to Petition for Writ of Certiorari.

v. Hale, 422 U.S. 171 (1975); and Miranda v. Arizona, 384 U.S. 436 (1966). Respondent submits, however, that this case is precisely within the rule of those decisions and represents the logical delimitation of that rule of law.

Although the issue presented in this case and reviewed in the lower courts is a question that should be ultimately decided by this Court, the instant case is not the procedurally appropriate vehicle for such an examination. Although Petitioner did raise the Miranda-related issue in his Florida court appeals, the resolution of that question did not necessarily depend upon an evaluation of the constitutional claim. Rather, as argued to the Florida courts and as is evident in the appellate record, Petitioner did not correctly raise and preserve the question for full

appellate review.

Florida law is quite explicit that, in order to review the propriety of any comment on an accused's exercise of the right to remain silent in the face of custodial interrogation, an immediate objection and motion for mistrial must be tendered to the Court, and a request for a curative instruction should be made. Clark v. State, 363 So. 2d 331 (Fla. 1978); State v. Woodson, 330 So. 2d 152 (Fla. 4th DCA 1976). The reason for this procedural rule is quite simple and is founded on practical necessity and basic fairness in the operation of a judicial system: it places the trial judge on notice that error may have been committed and provides him with an opportunity to correct it at an early stage of the proceedings. By failing to immediately

object and request a mistrial, the accused will not be allowed to later claim that his rights have been violated. Castor v. State, 365 So. 2d 701 (Fla. 1978); Clark v. State, supra.

Federal law is no different, and requires counsel to promptly raise specific objections and otherwise advise the court on preferred courses of action to allow any error or mistake to be corrected. E.g., Estelle v. Williams, 425 U.S. 501 (1976). And, of course, this Court has previously acknowledged that the failure to follow a state procedural rule ordinarily precludes federal review. Wainwright v. Sykes, 433 U.S. 72 (1977).

In the present case, no defense motion for mistrial was made until the conclusion of the testimony from Richard Biggs. Under Florida law, such an untimely request comes far too late to

preserve the issue, particularly in light of defense counsel's examination of the witness along the same lines as that now raised as error. Because the question was not correctly preserved, this Court should decline to review its merits.

Nevertheless, on the substance of the Fifth Amendment claim, Respondent submits that a comment on an accused's exercise of his right to remain silent is permissible in order to demonstrate that the accused was sane at the time of the criminal offense. In the instant case, Petitioner raised an insanity defense. He filed a pre-trial notice of intent to rely upon the defense of insanity. The defense cross-examined State witnesses as to Petitioner's mental state. The jury was asked by defense counsel to return a verdict

of not guilty by reason of insanity. Finally, the jury was instructed on insanity. Thus, for all practical purposes, Blakley admitted the commission of the criminal event but denied that he was responsible for his actions.

The avowed purpose of the Miranda rule is to protect the accused from testifying against himself. Logically, if an accused admits the crime, he has already testified against himself. Thus, no error of constitutional proportion occurred when it was revealed that Blakley exercised his Miranda rights.

This is precisely the situation not only left open in Doyle v. Ohio, supra, but inferentially acknowledged as proper. This Court will remember that the Doyle holding was merely that "the use for impeachment purposes of petitioner's silence, at the time

of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. Thus, since Petitioner's silence in this case was not used for impeachment but to demonstrate his sanity, its use does not run afoul of the Constitution.

The same result is reached when the decision in United States v. Hale, supra, is considered. There, this Court ruled that in most circumstances, since silence is so ambiguous as to be of little probative force, a comment upon an accused's silence carries with it intolerable prejudicial impact. The present case, however, is not the ordinary one. Rather, Petitioner's silence had probative value. By cogently exercising Miranda rights, in light of an insanity defense, Petitioner demonstrated an ability to compre-

hend his situation correctly and to appropriately orient his behavior. Both facets go to prove excellent insight and judgment which would negate an insanity defense under Florida's M'Naughten Rule.

Under the particular circumstances of this case, the State's introduction of Petitioner's silence was relevant and probative of an issue at trial. While the procedure utilized here is certainly within constitutional guidelines, this Court, in its discretion, may find it appropriate to expressly approve of the practice.

Finally, Respondent maintains that the question raised by Petitioner is not controlling on the ultimate issue of Petitioner's guilt of the crime charged. At no time in the state proceedings did Petitioner challenge the sufficiency of the evidence against him. Respondent

argued to the Florida courts that evidence of guilt was overwhelming, rendering any alleged error harmless beyond a reasonable doubt. Thus, this case is further consistent with Doyle v. Ohio, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
Attorney General of Florida
Tallahassee, Florida

BENEDICT P. KUEHNE
Assistant Attorney General
of Florida

KENNETH G. SPILLIAS
Assistant Attorney General
of Florida

111 Georgia Avenue
Suite 204
West Palm Beach, Florida
33401

Counsel for Respondent

APPENDIX A

CLOSING ARGUMENT

ON BEHALF OF THE DEFENDANT:

MR. LASWELL: Thank you, Judge, Mr. Springer. It's been a long three days here. I appreciate very much the attention that you have paid and the consideration that you have given us here.

I am going to ask you in a few moments to return a verdict of not guilty by reason of insanity. I am going to give you a reasonable basis for doing it.

The burden of proof is on the State of Florida. So, this is the only time you are going to hear from me before going to the jury room, with Mr. Springer's closing statements and the Judge's instructions.

What really was sort of on trial, I think, I feel is the intelligence of our community. I am not going to try and bamboozle you or jump up and down. This case doesn't fit into that category.

I am not going to deny one thing that Mr. Springer said. . . .
(T 407)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I furnished three (3) copies of the foregoing brief to counsel for Petitioner, MICHAEL E. GELTNER, ESQUIRE, Georgetown Appellate Litigation Clinic, Room 430, Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, and to TIMOTHY J. HMIELEWSKI, ESQUIRE, 8 South New River Drive East, Fort Lauderdale, Florida 33301, this_____ day of July, 1979.

JIM SMITH
Attorney General
Tallahassee, Florida

BENEDICT P. KUEHNE
Assistant Attorney General

KENNETH G. SPILLIAS
Assistant Attorney General

111 Georgia Avenue-Suite 204
West Palm Beach, Florida 33401

Counsel for Respondent